

No. 39274-7

THE COURT OF APPEALS FOR THE STATE OF WASHINGTON  
DIVISION II

---

STATE OF WASHINGTON,

Respondent,

Vs.

FREDERICK KARL HAACK,

Appellant.

FILED  
COURT OF APPEALS  
DIVISION II  
10 MAR 10 PM 1:09  
STATE OF WASHINGTON  
DEPUTY

---

Appeal from the Superior Court of Washington for Lewis County

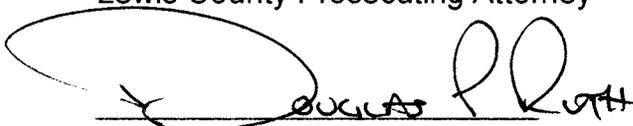
---

**Respondent's Supplemental Brief**

---

MICHAEL GOLDEN  
Lewis County Prosecuting Attorney

By:



DOUGLAS P. RUTH  
Deputy Prosecuting Attorney  
WSBA No. 25498

Lewis County Prosecutor's Office  
345 W. Main Street, 2nd Floor  
Chehalis, WA 98532-1900  
(360) 740-1240

*01-1-5 mhd*

TABLE OF CONTENTS

TABLE OF AUTHORITIES ..... ii

STATEMENT OF THE CASE ..... 1

ARGUMENT ..... 1

    I.    **THE STATE PRESENTED SUFFICIENT EVIDENCE  
          THAT THE DEFENDANT'S COMMUNICATIONS  
          WERE FOR IMMORAL PURPOSES TO ESTABLISH  
          HIS GUILT UNDER RCW 9.68A.090.....1**

    II.   **UNDER THE HOLDING OF *STATE V. McNALLIE*,  
          RCW 9.68A.090 IS NOT UNCONSTITUTIONALLY  
          VAGUE AS APPLIED TO DEFENDANT'S  
          COMMUNICAITONS.....15**

CONCLUSION ..... 22

**TABLE OF AUTHORITIES**

**Washington Cases**

C.J.C. v. Corporation of Catholic Bishop of Yakima, 88 Wn.App. 70, 943 P.2d 1150 (1997) *aff'd* 138 Wn.2d 699, 985 P.2d 262 (1999) (quoting McNallie, 120 Wn.2d at 933). ..... 5

City of Spokane v. Douglass, 115 Wn.2d 171, 795 P.2d 693 (1990). ..... 22

State v. Aljutily, 149 Wn.app. 286, 202 P.3d 1004 (2009). ..... 17

State v. Camarillo, 115 Wn.2d 60, 794 P.2d 850(1990) ..... 2

State v. Danforth, 56 Wn.App. 133, 136, 782 P.2d 1091 (1989). ..... 4

State v. Delmarter, 94 Wn.2d 634, 618 P.2d 99 (1980). ..... 2

State v. Hosier, 157 Wn.2d 1, 133 P.3d 936 (2006). ..... 7,8

State v. Jackman, 156 Wn.2d 736, 132 P.3d 136, 142,143 (2006). ..... 16

State v. Luther, 65 Wn.App. 424, 830 P.2d 674 (1992). .....13, 22

State v. McNallie, 120 Wn.2d 925, 846 P.2d 1358 (1993). ..... 3, 4,5,13,16,16,19

State v. Pietrzak, 100 Wn.App. 291, 997 P.2d 947 (2000). ..... 16

State v. Salinas, 119 Wn.2d 192, 829 P.2d 1068 (1992) ..... 2

State v. Walton, 64 Wn.App. 410, 824 P.2d 533 (1992). ..... 2

State v. Wissing, 66 Wn.App. 745, 833 P.2d 424, *review denied*, 120 Wn.2d 1017 (1992). ..... 6

## STATEMENT OF THE CASE

Appellant's version of the statement of the case is adequate for purposes of this response.

## ARGUMENT

On appeal, Pastor Haack makes two arguments. Both arguments involve interpreting the elements of the crime of Communication with a Minor for Immoral Purposes, RCW 9.68A.090. First, Pastor Haack argues that the state failed to prove beyond a reasonable doubt that his communication with the victim was for an immoral purpose. Second, he argues that the elements of the crime are unconstitutionally vague as applied to his conduct. Both of these arguments fail. Pastor Haack minimizes the controlling case law, which validates the trial court's conviction.

### **I. THE STATE PRESENTED SUFFICIENT EVIDENCE THAT THE DEFENDANT'S COMMUNICATIONS WERE FOR IMMORAL PURPOSES TO ESTABLISH HIS GUILT UNDER RCW 9.68A.090**

In relevant part, RCW 9.68A.090 reads, "...a person who communicates with a minor for immoral purposes, is guilty of a gross misdemeanor. RCW 9.68A.090(1). Although Pastor Haack doesn't state so expressly, his first argument challenges the sufficiency of the state's evidence to prove that he committed this

crime. He claims that the email messages sent to B.G. are insufficient to establish that he had an immoral purpose because the state did not prove that any of the conduct discussed in the messages would be illegal if actually performed.

The test for weighing the sufficiency of evidence in a criminal case is whether, after viewing the evidence in the light most favorable to the state, any rational trier of fact could have found guilt beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). A claim of insufficiency admits the truth of the state's evidence and all inferences that reasonably can be drawn from it. Salinas, 119 Wn.2d at 201, 829 P.2d 1068. In weighing the evidence, Washington courts will not reexamine the credibility of trial witnesses. Credibility determinations are for the trier of fact and are not subject to review. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850(1990)). A reviewing court must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. State v. Walton, 64 Wn.App. 410, 415-16, 824 P.2d 533 (1992). It must also give circumstantial evidence equal weight with direct evidence. State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980)).

Applying these principles, the state's evidence was sufficient to establish Pastor Haack's guilt. The testimony of Pastor Haack, the testimony of Detective Kimsey - the investigating officer - and most significantly, the email messages themselves prove that the objective of Pastor Haack's communications with B.G. was to expose and involve her in sexual misconduct and was, hence, for an immoral purpose.

RCW 9.68A.090 does not define "immoral purposes" and, therefore, has been challenged numerous times for vagueness. Today, the controlling opinion on the scope of the crime is the Supreme Court's opinion in State v. McNallie, 120 Wn.2d 925, 846 P.2d 1358 (1993). In McNallie, the defendant asked three young girls if they knew of anyone that would perform a sex act for money. McNallie, 120 Wn.2d at 926-927. He then exposed himself while demonstrating the act he was seeking performed. *Id.* He indicated that the girls could earn money performing the same sex act. *Id.*

The state charged McNallie with communicating with a minor for immoral purposes, RCW 9.68A.090. At trial, the court instructed the jury that to find McNallie guilty of the crime, it must find his communication with the children was for "immoral purposes of a sexual nature." The trial court declined to give McNallie's

instruction that required the jury to find that his communication expressed a desire to engage the minor in sexually explicit conduct involving photography or a live performance. A jury convicted McNallie.

On appeal, Division One held that the trial court's "to convict" instruction was too limited. Based upon *State v. Danforth*, the appeals court held that the term "immoral purposes" was unconstitutionally vague unless it referred to activity expressly defined as "sexual exploitation" under 9.68A RCW. *State v. McNallie*, 64 Wn.App. 101, 107, 823 P.2d 1122 (1992) (quoting *Danforth*, 56 Wn.App. 133, 136, 782 P.2d 1091 (1989)). The Supreme Court disagreed and both reversed the court of appeal's ruling and overruled *Danforth*. The Court rejected *Danforth's* requirement that the state make "reference to the individual sections of chapter 9.68A RCW to define the 'immoral purposes' for which communication with minors is legislatively prohibited." *McNallie*, 120 Wn.2d at 933. Based upon the legislature's findings introducing RCW 9.68A, the *McNallie* court held that the crime of communication for immoral purposes contemplates more than a minor's participation activities prohibited by that chapter. *Id.*

After adopting this more expansive reading of the law, the *McNallie* court approved the trial court's to convict instruction. The Court held that the instruction properly defined "immoral purposes" as "immoral purposes of a sexual nature" since this phrase adequately expressed the conduct criminalize by the law. WPIC 47.06; *McNallie*, 120 Wn.2d at 929. It wasn't necessary, according to the Court, that the to convict instruction require a jury to find that the conduct communicated by the defendant would be illegal under existing law. "The *McNallie* court explained that the statute criminalizes communication with minors 'for the predatory purpose of promoting their exposure to and involvement in sexual misconduct.' Thus, under *McNallie*, the jury could find that an act not specifically proscribed by another criminal statute constitutes communication with a minor for immoral purposes." *C.J.C. v. Corporation of Catholic Bishop of Yakima*, 88 Wn.App. 70, 943 P.2d 1150 (1997) *aff'd* 138 Wn.2d 699, 985 P.2d 262 (1999) (quoting *McNallie*, 120 Wn.2d at 933).

Pastor Haack's statements in the email messages sent to B.G. clearly fall within the scope of RCW 9.68A.090 as interpreted by the *McNallie* opinion. The statements provided the jury reasonable grounds to find that Pastor Haack communicated with

B.G. for immoral purposes of a sexual nature, that the communications were predatory, and that they promoted exposure to and involvement in sexual misconduct. Viewed singularly, each message may not establish a prima facie case that Pastor Haack communicated with a minor for immoral purposes. However, viewed in conjunction, and considering their sometimes contemporaneous delivery, the messages unquestionably establish such a case. When viewed as connected communications with B.G., the messages reveal their veiled, unwritten substance.

This reading of the evidence is consistent with the law. To establish guilt, the statute does not require that Pastor Haack have expressly invited B.G. to engage in sexual misconduct. See McNallie, 120 Wn.2d at 934, 846 P.2d 1358 (evidence that defendant stated to girls he would pay anyone for engaging in specific sexual conduct was sufficient for finding of guilt). Nor must a jury confine itself to a literal reading of the message's content when considering the facts of a case. See State v. Wissing, 66 Wn.App. 745, 752, 833 P.2d 424, *review denied*, 120 Wn.2d 1017 (1992) (concluding that it was reasonable to infer that the defendant was inviting a minor to engage in sexually explicit conduct for sexual gratification when the defendant asked the victim about

pornographic pictures, if he knew how to masturbate, and to see the victim's pubic hair). For instance, in *State v. Hosier*, the defendant was convicted of two counts of communication with a minor for immoral purposes. *State v. Hosier*, 157 Wn.2d 1, 7, 133 P.3d 936 (2006). One count alleged that the defendant placed a pair of pink girl's underpants on a chain link fence that surrounded a daycare center's playground. *Hosier*, 157 Wn.2d at 4. Written on the front of the underwear was a message fantasizing about sexual contact with an unnamed 7-year-old girl. *Id.* The defendant had written on the pants,

"I love baby sitting this little girl 7 yr old and already as nasty as most big girls ever get she does everything but fuck and real soon I'll be getting it all she is ready and willing just got to open up the gold mine to heaven ... daddy."

*State v. Hosier*, 124 Wn. App. 696, 701, 103 P.3d 217 (2004). The defendant argued on appeal to this court and then to the Supreme Court that this message did not amount to a communication because the children who found the pants were too young to read. Division One held that the statute did not require that the children understand the written message. It was enough, the court held, that the underwear contained a "sexually explicit message on it." *Hosier*, 124 Wn.App. at 707. The Supreme Court

agreed, but additionally reasoned that the defendant's message was "a symbolic message" to the children. *Hosier*, 157 Wn.2d at 13-14. The Court concluded that the defendant's conduct illustrated his "overall intent: to convince a young girl to take off her underpants to engage in sexual misconduct." *Hosier*, 157 Wn.2d at 13.

The *Hosier* holdings are important for this case because *Hosier*'s message did not contain a literal invitation to engage in sexual contact. The written message spoke of fantasizing about someone other than the actual victims. Nevertheless, the court held that the communication was for "immoral purposes." *Hosier*, 124 Wn.App at 707; 157 Wn.2d at 14. The Supreme Court looked at the "overall intent" and "symbolic message" that were behind the actual words used in the message, not just the express statements.

Viewing the evidence in the present case in a light most favorable to the State, the jury could infer that Pastor Haack's statements had implications other than their literal meaning. Any reasonable juror is aware that flirtatious or sexual communication, whether between adults or minors, is often replete with double entendres and metaphors. In our culture, this is often the manner in which individuals entice the opposite sex. Truly, sexual flirting is

often exclusively undertaken using this type of suggestive, implicit language. The subtext is normally as important as the text of a flirtatious or sexually oriented communication. The meaning is between the lines, not within them. Reasonable jurors know that reading flirtatious communication literally ignores this reality. A grown man does not repeatedly write statements regarding touching, female anatomy, and the viewing of underwear to a young, naive girl and mean only that which is written on the page. The repeated use of sexual references is a common form of enticing another individual to engage in sexual conduct. And when the other individual is a minor, the enticed sexual conduct is sexual misconduct. In this respect, the jury could infer that the volume of Pastor Haack's suggestive statements was probative of his intentions to expose or involve B.G. in sexual misconduct, although not single message expressly propositioned her to do so.

For instance, on December 23<sup>rd</sup> 2005, Pastor Haack wrote to B.G.,

"When are you going swimming? I bet you'll look fantastic in your suit. Hey maybe you could do some modeling for me when you get back in your cute outfits... I'll film you! I'll be at the church today between 11:30 & 12:30. Call me if you want..." Exhibit 14.

He followed up this somewhat mild message on the next day with the below messages:

**12:29 a.m.:** "It's good you feel my thoughts of blessing & healing for you also, you need to know that EVERYTHING tonight is gonna be alright. Even though I'm not physically there with you to be with you & hold you..... my heart is there with you. Do you know that? Right now think about how wonderful it feels to have someone hug you & caress your stressed muscles. Can you feel that? Are you better now?" Exhibit 15.

**10:22 a.m.:** "OK, so you are going to take a soak in the tub. Good! Just don't forget to wash those smelly armpits! Do I have to tell you wear else to wash little sister? Next thing you know you're going to make me come in there and wash your back for you... " Exhibit 16.

**7:44 p.m.:** "It sounds like you need a bit of TLC. Is that true baby girl? You need some strong hands to work their magic don't you. And what's this I hear about what's his name.....trying to get his you know what....you know where. You are right about telling him NO. Well, I wanted to let you know I'm back. I'll check my email again later. Later, baby sis. Big Bubba." Exhibit 17.

Less than a day later, on Christmas morning, Pastor Haack sent the following messages to B.G.:

**12:26 a.m.:** "so you get ugly as in down & dirty? Tell me, what's the worst thing you've done to anyone (guy or chick)? Big bubba wants to know what his little sister's been up to." Exhibit 19.

**1:08 a.m.:** "Well now, about that movie..... Seems to me you're getting hesitant to tell me about the sex scene....is it that bad? OK, I will watch it with you if think you can handle that." Exhibit 21.

**1:20 a.m.:** "Duh! It is meant to be enjoyed. So, what else happened.... in the movie? AND what happened

with you & what's his name at the movies? Just what exactly did baby sister let him do?" Exhibit 25.

He continued sending messages into the evening. In messages titled "nasty," "butt," and "Do You Like It That Way?," respectively, he wrote,

**10:26 p.m.:** "were they now. Hmmmmmm. Does baby sis like that? Also you wondered why some people use the word pussy instead of the medical term. Soooooooooooooooooooooo what name do you like?" Exhibit 3.

**10:39 p.m.:** "No, not the witches butt, silly. Let's talk about the other stuff.....like what you like to see, you know.....sexy stuff. So, you wonder why people call it a pussy. Maybe it's because it's sort of irresistible...and it's kinda soft..... And they like to be petted.....right?" Exhibit 4.

**11:08 p.m.:** "Does my sweet sister like nasty sex?" exhibit 5.

On December 26<sup>th</sup> 2005, he continued the same theme:

"You need to relax & get comfortable. OK? You'll have to do the best U can to get comfortable. I'm not able to assist u like I'd like 2. What R U wearing? R your clothes loose? If not, take them off." Exhibit 6.

Less than twenty four hours later, on December 27<sup>th</sup>, he wrote a number more messages to B.G.:

**1:36 a.m.:** "Let's be together. It'll be all right. Do you know that we'll be together soon.?" Exhibit 24.

**2:02 a.m.:** "My fingertips can sooth your pain." Exhibit 8.

**2:37 a.m.:** "Hey baby sis, I have a place for U to crash. There's an RV next to the church that is available for U. It will be warm & cozy. OK?" Exhibit 9.

**2:50 a.m.:** "I'm wondering why U R so Messy? Do U need to take off Your dirty shirt?" Exhibit 10.

**3:01 a.m.:** "Baby, tell me 'bout your underwear." Exhibit 11.

**3:12 a.m.:** "OK.....Can you try them on for me? Big Bubba will approve baby sister's new panties. OK? Maybe you should show then [sic] to me one at a time..... OK maybe tomorrow?" Exhibit 12.

**11:11 a.m.:** "If Bubba finds out his sister's been real naughty with her boyfriend..... Well, it depends whether or not she tells him about it BEFORE he hears about it from someone else OR catches them in the act. If sister confesses EVERYTING brother will be much more forgiving." Exhibit 27.

When viewed together, these messages belie the actual meaning of the text. Looking beyond the literal wording of the communications, as the court did in *Hosier*, it is apparent that Pastor Haack "overall intent" was to engage in sexual misconduct and his communications were designed to further that goal. From the content, sequence, and timing of these messages, a jury could infer that the communications were designed to induce the victim to engage in illegal sexual activity with Pastor Haack. The fact that Pastor Haack conveyed regret for writing the email messages to B.G. also supports a finding of guilt. 03/09/09 RP at 126-127, 130;

03/10/09 RP at 270. Clearly, Respondent's behavior constituted the type of "predatory undertaking" that our State Supreme Court has held is prohibited by RCW 9.68A.090. See McNallie, supra. Admitting the truth of the State's evidence and all inferences that reasonably can be drawn from it, it cannot be said that no rational trier of fact could have found that that the messages were written with "the predatory purpose of promoting [B.G.'s] exposure to and involvement in sexual misconduct." McNallie, 120 Wn.2d at 933. The jury's conviction of Pastor Haack should be affirmed.

Pastor Haack relies upon State v. Luther, 65 Wn.App. 424, 830 P.2d 674 (1992) to support his argument. In Luther, the defendant engaged in two acts of fellatio with his girlfriend. Luther, 65 Wn.App. at 425. Both the defendant and the girl were sixteen years of age and the acts of fellatio were consensual. Id. Prior to each instance, the defendant asked the girl whether she was going to provide fellatio as previously offered. Id. The defendant was charged with and convicted of violating RCW 9.68A.090. The conviction was reversed, however, when this court held that RCW 9.68A.090 did not prohibit communications about sexual conduct, immoral or not, that would be legal if performed. Luther, 65 Wn.App. at 427. The court stated that:

“...a statute should be construed, if possible, so as to render it constitutional, (citations omitted) and a statute will not pass constitutional muster unless it is ‘rationally connected to improving or benefitting the public peace, health, safety and welfare.’ (citations omitted) Although it is rational to prohibit certain communications designed to further conduct that would be illegal if performed, or that will breach the peace, there can be no rational reason for prohibiting communications about peaceful, consensual conduct that will itself be legal if performed.”  
Id.

The present case is distinguishable. Unlike the *Luther* defendant's statements, Pastor Haack's email messages are not the type of communication that could be construed as peaceful and that benefited the public health, safety and welfare. This is not a situation, as was contemplated in *Luther*, between consenting sixteen year olds. This is a situation in which Pastor Haack communicated with B.G. in a predatory attempt to groom her to participate in sexual misconduct for his own sexual gratification. If read in the context of flirtatious communications, they suggest conduct that would be illegal if performed. Prohibiting this type of communication is rationally connected to improving or benefitting the public peace, health, safety and welfare. In fact, Pastor Haack's messages are precisely the type of conduct the legislature was targeting when it enacted RCW 9A.68.090. While the behavior of the defendants in *McNallie*, *Pietrzak*, and *Shimmelpfenning* could

have been prosecuted as attempted sexual misconduct under RCW 9.68A., this avenue was not an option to respond to Pastor Haack's messages. However, it is this type of communication that ultimately leads to child abuse if unaddressed.

## **II. UNDER THE HOLDING OF *STATE V. McNALLIE*, RCW 9.68A.090 IS NOT UNCONSTITUTIONALLY VAGUE AS APPLIED TO DEFENDANT'S COMMUNICAITONS**

Pastor Haack's second argument, which he raises in the alternative, is that the crime of Communication with a Minor for Immoral Purposes is unconstitutionally vague as applied in this case. He argues that the terms "immoral purposes" and "sexual misconduct" must be read to circumscribe only illegal conduct if the statute is to be applied constitutionally. If the terms are applied more broadly, he claims, the citizenry is forced to guess at the scope of the crime and law enforcement is left unchecked when enforcing it. These concerns, however, are misplaced. The statute has been narrowly, and authoritatively, construed removing the possibility of arbitrary and indefinite application in this case.

As noted above, the Supreme Court in *McNallie* examined the term "immoral purposes" and interpreted its meaning to be "the predatory purpose of promoting [children's] exposure to and involvement in sexual misconduct." *McNallie*, 120 Wn.2d at 931-

32. In doing so, the *McNallie* court rejected the very argument that Pastor Haack is now offering. The court concluded that it was unnecessary to tether the term "immoral purposes" to "the individual sections of chapter 9.68A RCW" in order to rid the crime of any vagueness. *McNallie*, 120 Wn.2d at 933. The court held that a person of common understanding did not need to guess or speculate as to the penalties of the statute if read to prohibit communication with minors "for the predatory purpose of promoting their exposure to and involvement in sexual misconduct." *Id.*

Admittedly, the Supreme Court's reading of the statute is expansive. *McNallie's* general prohibition on communication with minors "incorporates within its scope a relatively broad range of sexual conduct involving a minor." *State v. Jackman*, 156 Wn.2d 736, 748, 132 P.3d 136, 142,143 (2006). Still, the Court's limiting construction of the statute is not impermissibly vague since it places a person of ordinary intelligence on notice of what conduct is prohibited, and provides a standard of enforcement for law enforcement officials. *State v. Pietrzak*, 100 Wn.App. 291, 295, 997 P.2d 947 (2000).

Moreover, division three has observed, in the context of a first amendment challenge, that the court's construction places

limits on the types of communication that can trigger a criminal response for violation of the statute:

"The requirements that the communication be made with the intent that it reach a minor, and done with the immoral or predatory purpose of exposing or involving a minor in sexual misconduct, sufficiently limits the amount of speech or conduct that the statute regulates and ensures that a substantial amount of protected expressive activity is not deterred."

State v. Aljutily, 149 Wn.app. 286, 297, 202 P.3d 1004 (2009).

The statute is no more vague as applied to Pastor Haack's communication. Any person of common understanding can conclude that the messages quoted above are "predatory." Further, Pastor Haack admitted that they were of a "sexual nature." 03/09/10 RP at 267. Finally, it is clear that they were written for the purpose of promoting B.G.'s exposure to and involvement in sexual misconduct. A dictionary definition of "misconduct" is "improper conduct; wrong behavior." RANDOM HOUSE WEBSTER'S UNABRIDGED DICTIONARY 1228 (1998). One need not resort to guessing to conclude that asking a minor, especially a minor that is part of a pastor's congregation, to describe her underwear, speak about "nasty sex," to describe sex acts she would like to see, to describe the "worst" sex acts she has

participated in, and to discuss petting intimate areas is involving the minor in wrong behavior. The fact that Pastor Haack found his own conduct to be "inappropriate" and "foolish" supports the clear application of the statute to his messages. 03/09/10 RP at 135-36; 03/10/10 at 259 & 270.

Pastor Haack attempts to distinguish cases that have addressed and rejected vagueness challenges to RCW 9.68A.090. He argues that the communications at issue in *McNallie*, *Schimmelpfennig*, and *Pietrzak* fell solidly within the scope of the statute as circumscribed by the *McNallie* ruling, but that the applicability of his communications is less clear. The state disagrees.

The defendants in *McNallie*, *Schimmelpfennig*, *Pietrzak*, attempted to entice the victims to perform or participate in some sexual act. More specifically, in *McNallie* and *Schimmelpfennig*, the defendants made an effort to lure victims into their vans to engage in sexual acts. In *Pietrzak*, the defendant attempted to entice his niece to allow him to photograph her nude. These acts are not so different from Pastor Haack's conduct. Similar to the conduct in these three cases, Pastor Haack also attempted to entice B.G. through his

messages to engage in sexual misconduct. The only difference between the conduct of the defendants in those cases and that of Pastor Haack was his lack of overt propositioning of B.G. to participate in a sex act. But his conduct is no less concerning. It is no less a breach of a "sacred trust" by someone who seeks "personal gratification based on the exploitation of children." *McNallie*, 120 wn.2d at 933 (quoting 9.68A.001). In fact, in this difference are the seeds of a more insidious type of behavior than that condemned in *McNallie*, *Schimmelpfennig*, and *Pietrzak*.

The defendants in those three cases attempted to appeal to their victim's pecuniary interest and sexual desires to entice them into participating in sexual misconduct. But both the upbringing of all but a small percentage of children, and children's general fear of strangers makes this strategy, thankfully, largely ineffective, as it was in those cases.

In contrast, Pastor Haack used his position as an adult, as B.G.'s pastor, as B.G.'s friend, and appealed to her sexual curiosity and adolescent insecurities to attempt to involve B.G. in sexual misconduct. This type of predatory behavior is much more concerning and threatening. Because Pastor

Haack's communications were not overt, they are more corrupting and influential. As we have seen from news events occurring in the past few years, this type of grooming is as dangerous to young girls as is sexual misconduct involving force.

The exhibits are replete with evidence of the type of predatory grooming that the crime intends to deter. For instance, Pastor Haack refers to her as his little sister and himself as her big brother. He signs some messages "Pastor Haack" and informs B.G. that she can tell him anything and he is there for her "no matter what...". Exhibits 35, 35, 23 & 7. But then he goes on to address sexual topics and acts. After asking her if she likes "nasty sex," whether she is touching herself, and after suggesting that they "be together" and "talk about "sexy stuff," he invites her to stay at an RV that is behind his house. He describes the RV as warm and cozy and titles the email message, "special place." Exhibits 5 & 9. Throughout the exhibits, his communications intertwine his caring feelings for her with his improper inquiries: his desire to hear about her sex life, requests for descriptions of her disrobing, and discussions of intimate anatomy. In one

message he praises B.G. for not participating in sexual activity with her boyfriend, but in another asks for a description of the "naughty" details of her interaction with her boyfriend. Exhibits 27, 17. In another, he asks her, "so you get ugly as in down & dirty... what's the worst thing you've done to anyone (guy or chick)?" And a few minutes later tells her "I like you more all the time." Exhibits 19 & 22. Later, he lightly scolds her for being too embarrassed to describe the sex scenes in a movie. Exhibit 20, 21.

Through these and other messages, Pastor Haack trivializes sexual activity by a minor and promotes B.G. providing him descriptions of sexual acts. While some messages do contain innocent comments, as the defendant notes, this innocent content merely makes the improper suggestions seem less threatening and embarrassing. Taken as a whole, the messages reveal a clear scheme of grooming a young girl. The most direct of the messages lay bare this scheme. What purpose do the questions "do you like nasty sex," "are you touching yourself," "what name do you like [instead of 'pussy']" serve other than to appeal to a young victim's sexual curiosity and to incrementally lower her sexual

inhibitions? Exhibits 5, 1 & 3. Why would a pastor ask such questions to a young girl in his congregation? There is no acceptable or moral reason.

It is this type of communication that falls squarely within the area of conduct prohibited by RCW 9.68A.090. It certainly is the type of conduct that a reasonable person would recognize as improper behavior, and not behavior that is "improving or benefiting the public peace, health, safety and welfare." Luther, 65 Wn.App. at 427. Any reasonable person, and especially a reasonable pastor, writing email messages like the ones sent by Pastor Haack in the wee hours of a morning could not conclude that his communications were anything but wrongful behavior for an immoral purpose.

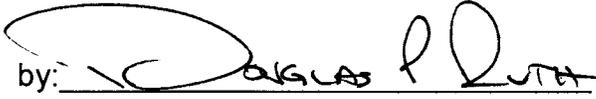
Statutes are presumed to be constitutional and will be declared unconstitutionally vague only if the party challenging the statute satisfies the heavy burden of proving invalidity beyond a reasonable doubt. City of Spokane v. Douglass, 115 Wn.2d 171, 182-83, 795 P.2d 693 (1990). Pastor Haack has not met that burden here.

## CONCLUSION

For the foregoing reasons, this court should affirm Mr. Haack's conviction.

RESPECTFULLY submitted this 9 day of March, 2010.

MICHAEL GOLDEN  
Lewis County Prosecuting Attorney

by:  DOUGLAS P. RUTH

DOUGLAS P. RUTH, WSBA 25498  
Attorney for Plaintiff

COURT OF APPEALS FOR THE STATE OF WASHINGTON  
DIVISION II

STATE OF WASHINGTON, )  
Respondent, )  
vs. )  
FREDERICK KARL HAACK, )  
Appellant. )  
\_\_\_\_\_ )

NO. 39274-7

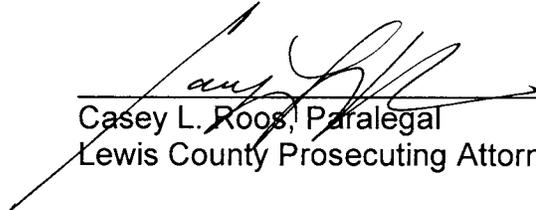
DECLARATION OF  
MAILING

FILED  
COURT OF APPEALS  
DIVISION II  
10 MAR 10 PM 1:09  
STATE OF WASHINGTON  
BY \_\_\_\_\_  
DEP

Ms. Casey Roos, paralegal for Douglas Ruth, Deputy Prosecuting Attorney, declares under penalty of perjury under the laws of the State of Washington that the following is true and correct: On March 9, 2010, the appellant was served with a copy of the **Respondent's Supplemental Brief** by depositing same in the United States Mail, postage pre-paid, to the attorney for Appellant at the name and address indicated below:

Eric Nielsen  
NIELSEN BROMAN & KOCH, PLLC  
1908 E Madison St  
Seattle WA 98122

DATED this 9<sup>th</sup> day of March 2010, at Chehalis, Washington.

  
\_\_\_\_\_  
Casey L. Roos, Paralegal  
Lewis County Prosecuting Attorney Office